



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 25, 1996

Ms. Joanne Wright
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR96-2196

Dear Ms. Wright:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 103084.

The Texas Department of Transportation (the "department") received a request for "the complete applications of Texas Shaft, Inc. and Bell Bottom Foundation Company for DBE certification, together with all documents including any supplements or reports of changes in status or circumstances of the companies, which substantiate their qualifications or reflect your investigation of these companies." You state that you have no information on Bell Bottom Foundation and assert that the information relating to Texas Shaft, Inc. is excepted from required public disclosure pursuant to sections 552.101, 552.103, and 552.110 of the Government Code.

When asserting section 552.103(a), a governmental body must establish that the requested information relates to pending or reasonably anticipated litigation.¹ Thus, under section 552.103(a) a governmental body's burden is two-pronged. The governmental body must establish that (1) litigation is either pending or reasonably anticipated and that (2) the requested information relates to that litigation. *See Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4.

¹Section 552.103(a) excepts from required public disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 (1986) at 4. You have provided this office with a Petition to Perpetuate Testimony, filed in the 98th Judicial District of Travis County, Texas, in which the petitioner states that it "anticipates the institution of an action to be filed" and in which the department is listed as a "person[] expected to be interested adversely to petitioner in such anticipated lawsuit." In this instance, we conclude that litigation is reasonably anticipated and that the requested information relates to that anticipated litigation. Consequently, the department may withhold the requested information under section 552.103 of the Government Code.²

In reaching this conclusion, however, we assume that the opposing party to the anticipated litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, e.g., through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). If the opposing party in the anticipated litigation has seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Todd Reese", with a long horizontal flourish extending to the right.

Todd Reese
Assistant Attorney General
Open Records Division

RTR/rho

²As we resolve this matter under section 552.103, we need not address the other exceptions you have raised. We caution the department, however, that some of the information may be confidential by law or may implicate the proprietary interest of a third party. Therefore, if the department receives a request in the future, at a time when litigation is no longer reasonably anticipated or pending, the department should seek a ruling from this office on the other exceptions raised before releasing any of the requested information. See Gov't Code § 552.352 (distribution of confidential information may constitute criminal offense).

Ref.: ID# 103084

Enclosures: Submitted documents

cc: Mr. Douglas R. Drucker
Wetzel, Henri & Drucker, L.L.P.
P.O. Box 73268
Houston, Texas 77273-3268
(w/o enclosures)

Mr. James D. Braddock
Kelly, Hart & Hallman, P.C.
301 Congress, Suite 2000
Austin, Texas 78701
(w/o enclosures)